INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	2
a. Elevators	5
b. Mechanical (plumbing, heating, air conditioning, etc.)	6
c. Electrical	7
Argument	7
Conclusion	11

CITATIONS

Cases:	
Bins v. *United States*, 331 F. 2d 390	9
Henninger v. *United States*, 350 F. 2d 849	9
Neely v. *United States*, 300 F. 2d 67, certiorari denied, 369 U.S. 864	11
Ogden v. *United States*, 303 F. 2d 724, certiorari denied, 376 U.S. 973	11
Sells v. *United States*, 262 F. 2d 815, certiorari denied, 360 U.S. 913	11
United States v. *Harriss*, 347 U.S. 612	9
United States v. *Killian*, 246 F. 2d 77	11
United States v. *Marchisio*, 344 F. 2d 653	11
United States v. *National Dairy Corp.*, 372 U.S. 29	9
United States v. *Pesano*, 293 F. 2d 229	9, 10
Statute:	
18 U.S.C. 1010	1, 2, 7, 9, 11

226-493—66

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 198

DANIEL R. GEVINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. D) is reported at 358 F. 2d 761.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1966. A petition for rehearing was denied on May 10, 1966. The petition for a writ of certiorari was filed on June 3, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment stated an offense under 18 U.S.C. 1010.

2. Whether the judge properly instructed on the elements of the offense.

3. Whether the evidence supported the verdict.

STATUTE INVOLVED

18 U.S.C. 1010 provides in pertinent part:

> Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT

Petitioner was convicted after a trial by jury in the United States District Court for the Northern District of Texas on a single-count indictment charging him with wilfully and knowingly causing false statements to be made to the Federal Housing Administration for the purpose of influencing its action, in violation of 18 U.S.C. 1010 (R. I, 1–2, 89). He was sentenced to imprisonment for a period of two years and fined $5,000 (R. I, 105–106). The court of appeals unanimously affirmed the conviction.

The evidence at trial may be summarized as follows:

Petitioner was the sponsor of a building project in Dallas, Texas, known as the 21 Turtle Creek Square project (R. III, 682). He had a two-year option on the land on which the apartments were to be built (R. I, 169; R. III, 757). He made an application for F.H.A. insurance financing in June 1960, which was rejected (R. III, 652–654, 678). A re-application, dated July 11, 1960, was also rejected by the Dallas F.H.A. office in August 1960 (R. III, 655). Petitioner appealed this rejection to Washington, and the action of the Dallas office was reversed (R. III, 655). Since the option on the land was soon to expire, petitioner was assured that a F.H.A. commitment would be forthcoming by October 1961.

About September 20, 1961, a group of F.H.A. specialists, headed by Grover Martin, were sent to Dallas for the purpose of conducting the architectural processing, including the cost estimate, preliminary to a F.H.A. mortgage commitment for the Turtle Creek project (R. I, 169, 288–289). The F.H.A. specialists, working against an October deadline, were given only a few weeks to complete an analysis normally requiring approximately sixty days (R. I, 289–290).

Petitioner was anxious to help expedite the commitment and directed an associate, Parker Folse, to offer the local F.H.A. people any assistance he could (R. I, 169). On instructions from petitioner, Folse inquired of Martin whether petitioner's subcontract bids would help Martin in determining the accurate cost of the project (R. I, 172; R. II, 293). Martin responded

affirmatively and said that he would take the lowest or substantially lowest bids as one source of data in connection with the estimate on this project (R. I, 176; R. II, 293–294, 327).

Acting under petitioner's direction and supervision, Folse submitted various bids and estimates totaling $8,882,242.38 to Martin, representing them to be the lowest bids, sub-contract proposals and estimates available on October 5, 1961 (R. I, 173–196).[1] Included in the submission were subcontractor bids for the mechanical, electrical and elevator phases of the project—the items named in the indictment. These bids were firm in nature as distinguished from mere tentative proposals or estimates (R. I, 192–195).

The facts were that petitioner had other substantially lower bids totalling $800,000 less on the three

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[1] Petitioner supplied the bids to Folse and told him they were the lowest bids to date and reflected what would be the contract cost of construction (R. I, 175–176). Folse had no knowledge of any lower bids than those furnished by petitioner (R. I, 166, 187, 225, 234).

The cover letter written by Folse dated October 5, 1961, stated (Gov. Ex. 2; R. I, 185–186):

> Enclosed please find a list of subcontract bids, proposals and estimates which may facilitate the verification of costs in pricing the Turtle Creek Towers (82) North Apartments. These prices represent the lowest prices obtainable at this date in all cases and are gathered from the files delivered under separate cover.
>
> I believe these costs are true and accurate though in all cases they may not be the ultimate ones by which contracts will be awarded. By this I mean to explain that negotiations will continue until the owner and architect are satisfied that the quality of the materials and workmanship are commensurate with the plans and specifications and represent the best economies.

items in his possession on October 5, 1961, from the same mechanical, electrical and elevator sub-contractors. He did not disclose these lower bids to the F.H.A. group.[2]

a. *Elevators.*—The amount specified in the October 5 letter by Folse as the lowest elevator bid was $298,600 (R. I, 186, 193–194). This bid was obtained in September 1961 from Mr. Glen Young, sales representative for Otis Elevator Company, after petitioner stated that he was in a hurry to get pricing information on elevator equipment for the Turtle Creek project (R. II, 357–359). It was a "good working price" based not on any detailed study of any plans and specifications, but on estimates of comparably sized buildings and more expensive equipment than was ultimately sold (R. II, 360, 366–369, 379–381). Thereafter, representatives of Otis Elevator Company entered into discussions with petitioner on the price aspects of the job, based upon a detailed study of the plans and specifications. They agreed on a price of $205,168 (R. II, 365, 381–383). Petitioner accepted this bid in writing on September 30, 1961 (R. II, 362–363). He did not disclose this contract to F.H.A. in his October 5, 1961, submission.

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[2] It was the theory of the government's case that at the time petitioner caused Folse to represent to F.H.A. that the high elevator, mechanical and electrical bids were the lowest prices obtainable and the lowest subcontract bids on October 5, 1961, petitioner had in hand substantially lower bids geared to the plans and specifications already submitted to F.H.A.; that he knowingly and deliberately did not submit such lower bids; and hence that he knowingly caused false representations to be made to the F.H.A. with intent to influence its action.

b. *Mechanical (plumbing, heating, air conditioning, etc.).*—The lowest mechanical bid listed in the October 5, 1961 letter was $1,672,340 (R. I, 186, 194–196). This bid was obtained after petitioner, about September 19, 1961, telephoned Robert Wallace, a mechanical contractor in Dallas, and stated that he wanted by the next day a high proposal for the mechanical work on the Turtle Creek project "for budgetary purposes, to make certain financial arrangements" (R. II, 438–439, 454–455, 467, 471). Wallace went through past files on similar projects, made a preliminary review of the mechanical drawings for this project, and submitted to petitioner by letter dated September 20, 1961, a "guesstimate" appearing on its face to be a firm proposal of $1,639,340 for the mechanical work, plus an optional additional $33,000 for refrigeration (R. I, 194–195; R. II, 438–440, 442, 467–469). Thereafter, Wallace & Company prepared a complete cost estimate of the mechanical work based on a complete review of the mechanical plans and specifications (R. II, 441–442). By letter dated September 26, 1961, it submitted a guaranteed lump sum bid, designated as a "revised proposal," of $999,000 plus an optional $33,000 for refrigeration (R. II, 441, 444–449). Petitioner accepted this proposal in his capacity as corporate president on the same day, September 26, 1961 (R. II, 449). Both the high and low proposals were based on the same plans and specifications, except that the first was based only on a preliminary examination (R. II, 455–456, 482). The low bid and contract were not disclosed to the F.H.A. group in the October 5, 1961 submission.

c. *Electrical.*—The lowest electrical subcontractor bid was stated in the October 5, 1961, letter to be $548,000 (R. I, 186, 192–193). In fact, petitioner obtained two bids on the project from the same electrical subcontractor on September 25, 1961. The one for $548,000 was furnished to petitioner "for the purpose of making a proper financial arrangement" (R. II, 428–429). This bid was based on the electrical plans and specifications plus "certain allowances that were not included in the initial plans and specs, electrically" (R. II, 397–399, 409, 415, 418, 430). The other bid was in the amount of $415,000 (R. II, 400–401, 427), and was determined "strictly in accordance with the plans and specifications" furnished by petitioner (R. II, 406–407, 416, 430).[4] Both bids were identical except for prices. They referred to the same plans and specifications. This bid was not disclosed to the F.H.A. group. Petitioner accepted the $415,000 proposal by letter dated November 2, 1961 (R. II, 403–404).

ARGUMENT

1. Petitioner argues that 18 U.S.C. 1010 proscribes false statements to F.H.A. only if made for the three purposes specifically enumerated in the statute—i.e.,

[4] The electrical contractor testified that the principal difference between the $548,000 and $415,000 bids resulted from including lighting fixtures in the higher bid which were not a part of the electrical plans and specifications because petitioner was going to buy them from someone else (R. II, 434–435). In the October 5, 1961, submission to F.H.A., lighting fixtures were listed separately from the electrical bid at $138,000 and characterized as additional project cost estimates of items not listed or bid in other items (R. I, 255–256).

obtaining (1) any loan or advance of credit (2) any extension or renewal of any loan, advance of credit, or mortgage or (3) any acceptance, release, or substitution of any security on such a loan or advance of credit (Pet. 13–15). The statute, however, contains a concluding phrase which covers false statements knowingly made to F.H.A. "for the purpose of influencing in any way the action of such Administration." Since petitioner caused false statements to be made for the purpose of influencing the F.H.A. cost analysis group to issue an inflated cost estimate on the Turtle Creek project, his conduct unambiguously falls within the general prohibition.[4] The cases cited by petitioner (Pet. 14–15) involved charges that false statements had been made for the purpose of obtaining a loan, and instructions to the jury were framed in terms of those indictments. Similar instructions are obviously not required when the charge is that a false statement was submitted to influence the F.H.A. in another way.

Petitioner's suggestion that the phrase "in any way" makes the general prohibition unconstitutionally vague (Pet. 13) is unsound. The context of the phrase indicates the statute was intended to assure that decisions made by F.H.A. officials on matters within their statutory jurisdiction would be based on truthful representations. "Void for vagueness simply means that criminal responsibility should not

[4] It is reasonable to infer that the false statements were given to obtain an inflated loan commitment and would, therefore, have properly been indictable as false statements for the purpose of obtaining a loan.

attach where one could not reasonably understand that his contemplated conduct is proscribed." *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32–33; see also *United States* v. *Harriss*, 347 U.S. 612, 617. Here petitioner intended that his false statements would improperly influence an official act.

2. There is no merit to petitioner's contention that the trial court gave inadequate instructions to the jury by failing to define the statutory phrase "for the purpose of influencing," which is said to embody the "specific intent to mislead, deceive or defraud" (Pet. 8–12).[5] Petitioner failed to request any definition at trial and the phrase is not one that intrinsically needs defining. As noted by the court of appeals, the trial court correctly charged the essential elements of the offense—knowingly and wilfully making a false statement or causing it to be made for the purpose of, in some way, influencing the action of the F.H.A. and with the knowledge that the statement was false. *E.g., Bins* v. *United States*, 331 F. 2d 390 (C.A. 5); *Henninger* v. *United States*, 350 F. 2d 849 (C.A. 10); *United States* v. *Pesano*, 293 F. 2d 229 (C.A. 2). The *mens rea* inherent in the offense under 18 U.S.C. 1010 is alleged in the indictment by the terms "knowingly" and "wilfully" and is adequately instructed by a definition of those terms. *United States* v.

[5] Petitioner also complains that the indictment should have contained an allegation of a specific intent to mislead, deceive or defraud (Pet. 3). However, no such objection to the indictment was made in the trial court or in the court of appeals. The indictment charged that the false statements were made for the purpose of influencing F.H.A. action.

Pesano, 293 F. 2d 229 (C.A. 2). The trial court defined those terms precisely as requested by petitioner (R. I, 77, 82–83).

3. Petitioner's contention (Pet. 18–21) that the evidence was insufficient to support his conviction is refuted by the facts set forth at pp. 3–7, *supra*. The evidence clearly established that, for the purpose of influencing the grant and the size of a loan from the F.H.A., petitioner submitted bids as the lowest available at a time when he knew that there were lower bids geared to the plans submitted to F.H.A. Indeed, he had already accepted two such lower bids.

Apart from knowledge and intent (which is clearly shown), the main thrust of petitioner's argument is that the lower bids remaining in his possession were based on different plans and specifications than the high bids. The jury properly concluded that the low bids were the ones applicable to the plans before F.H.A. The low elevator bid was based on specifications agreed upon well before petitioner's representations to F.H.A. These specifications were incorporated in the set of plans and specifications marked "Processing set *retain in Dallas*" (Defense Exhibit 19). In the four sets of plans and specifications identified at trial (Defense Exhibits 7, 13, 19 and 26), the mechanical and electrical specifications were identical in all relevant respects. Each of the subcontractors testified that his low bid was based on the plans and specifications furnished by petitioner.

Petitioner also contends that the government must, in addition to proving falsity beyond a reasonable

doubt, conform to the "two-witness" rule applicable to perjury prosecutions (Pet. 15–18). It is well settled that the two-witness rule is not applicable to a prosecution for making a false statement under 18 U.S.C. 1010 and comparable sections. See, *e.g.*, *United States* v. *Marchisio*, 344 F. 2d 653 (C.A. 2); *Ogden* v. *United States*, 303 F. 2d 724, 744–745 (C.A. 9), certiorari denied, 376 U.S. 973; *Neely* v. *United States*, 300 F. 2d 67, 69–70 (C.A. 9), certiorari denied, 369 U.S. 864; *Sells* v. *United States*, 262 F. 2d 815, 821–822 (C.A. 10), certiorari denied, 360 U.S. 913; *United States* v. *Killian*, 246 F. 2d 77, 82 (C.A. 7). Moreover, the perjury standard was, in fact, more than amply met, although the jury was not instructed that it was to apply that standard.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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